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NO. 84-1155

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

WESTINGHOUSE ELECTRIC CORPORATION,
Appellant,

v.

JOHN K. KING, COMMISSIONER OF REVENUE,
STATE OF TENNESSEE,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

THOMAS O. HELTON, Counsel of Record,
CARL E. HARTLEY, C. GEORGE CAUDLE,
Attorneys for Appellant,
Westinghouse Electric Corporation

Address and Telephone Number of
Counsel of Record:
Stophel, Caldwell & Heggie, P.C.
450 Maclellan Building
722 Chestnut Street
Chattanooga, Tennessee 37402
(615) 756-2010

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Appellant, Westinghouse Electric Corporation ("Westinghouse") submits this Brief in Opposition to Appellee's Motion to Dismiss or Affirm. Westinghouse states pursuant to Rule 28.1 that the List of Related Companies, filed as Appendix J to

Westinghouse's Jurisdictional Statement, is currently accurate.

This appeal addresses the constitutionality of the Tennessee Business Tax Act, Tenn. Code Ann. §§67-5801 et seq. (presently §§67-4-701 et seq.). The issues presented in Westinghouse's Jurisdictional Statement are whether the internal consistency test enunciated by this Court in Armco Inc. v. Hardesty, 104 U.S. 2620, reh'g denied, 53 U.S.L.W. 3270 (1984), is to be applied in determining the constitutionality of the Tennessee Business Tax Act as imposed on Westinghouse and whether that Act satisfies the Armco test. The Armco test requires that a state tax on interstate commerce must have what this Court called "internal consistency," that is, if the same tax were imposed by every jurisdiction, it would not impermissibly

interfere with free trade. This Court in Armco recognized that impermissible interference with free trade exists where an interstate taxpayer faces the risk of multiple taxation. See also Freeman v. Hewit, 329 U.S. 249, 256 (1946), reh'g denied, 328 U.S. 832 (1947). Westinghouse maintains that the Armco internal consistency test is the proper test to be applied and that the Tennessee Business Tax Act is unconstitutional because it fails to meet that test.

Westinghouse respectfully suggests that the Appellee, the Commissioner of Revenue, State of Tennessee ("Commissioner"), fails to address these issues in his Motion to Dismiss or Affirm. Rather, by his extensive recitation of facts, the Commissioner seeks to obscure these issues by focusing this Court's attention on whether there was a

substantial nexus between Westinghouse and the State of Tennessee. Nexus is not an issue presented in this appeal.

The Commissioner also erroneously suggests that Westinghouse has taken out of context a sentence from either the decision of the Tennessee Supreme Court or from this Court's decision in Armco in order to "manufacture" a conflict between those decisions. The Tennessee Supreme Court stated clearly that Westinghouse "must demonstrate that it suffers from the burden of multiple taxation." Jurisdictional Statement, Appendix, A-23; Westinghouse Electric Corp. v. King, 678 S.W.2d 19, 26, reh'g denied, id. (1984). Applying this actual multiple taxation standard, the Tennessee Supreme Court concluded that the taxes imposed upon Westinghouse were properly apportioned. In Armco, this Court stated, however,

that a showing of actual discriminatory impact "is not the test." 52 U.S.L.W. at 4789. Contrary to the Commissioner's assertions, nothing has been taken out of context. Westinghouse relies on the holding of this Court in Armco. The Tennessee Supreme Court's holding is in irreconcilable conflict with Armco.

The Commissioner further obscures the issues presented in this appeal by mischaracterizing the scope of the Tennessee Business Tax Act in order to contend that there is no risk of multiple taxation. The Commissioner incorrectly asserts that the Tennessee Supreme Court held that the Tennessee Business Tax applies "only to the taxable privilege of doing business in Tennessee." See Appellee's Motion at 5. In fact, the Tennessee Supreme Court actually determined that the Tennessee Business Tax

Act applies to

> the privilege of doing business as that business is defined by the statute. The business of making sales of tangible personal property is a taxable privilege under the statute. Thus, the statutory provisions pertinent to this case do not tax all business activity but only that business activity engaged in selling tangible personal property. Jurisdictional Statement, Appendix, A-11; 678 S.W.2d at 23; (Emphasis supplied) (Footnote omitted).

The privilege "of making sales of tangible personal property" is, contrary to the Commissioner's contention, obviously a privilege taxable by more than one state.

This risk of multiple taxation is underscored by the Tennessee Supreme Court's further analysis of the Tennessee Business Tax Act. That Act defines a "sale" to include "any transfer of title or possession or both . . ." Tenn. Code Ann. §67-5804(b) (presently §67-4-702(a)(12)). The Tennessee Supreme

Court, in interpreting the Tennessee Business Tax Act, found "no explicit language in this subsection [Section 67-5804(b)] or the remainder of the Act limiting the tax to transfers of title within the state." Jurisdictional Statement, Appendix, A-12 and A-13; 678 S.W.2d at 24. It is uncontroverted that title to the equipment sold to TVA passed outside the State of Tennessee. Nonetheless, the Tennessee Supreme Court upheld the imposition of the tax on Westinghouse because possession of that equipment passed to TVA inside the State of Tennessee. Under this application of the Act by the Tennessee Supreme Court, the business of "making sales of tangible personal property" would not only be taxable by the State of Tennessee, but would also be taxable by other states adopting a tax statute identical to the

Tennessee Business Tax Act. For instance, if either Pennsylvania or Florida (or any other state), where title passed to TVA, adopted a tax statute identical to the Tennessee Business Tax Act, Westinghouse would be subject to actual multiple taxation--that is, both in the state where title was transferred and in the state where possession was transferred.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss or Affirm should be denied and this Court should note probable

jurisdiction and grant plenary consideration of this appeal.

Respectfully submitted,

Stophel, Caldwell & Heggie, P.C.

By _____
(Thomas O. Helton)

By _____
(Carl E. Hartley)

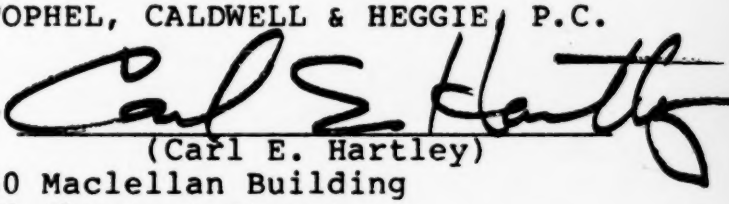
By _____
(C. George Caudle)

Attorneys for Appellant,
Westinghouse Electric Corporation
450 Maclellan Building
722 Chestnut Street
Chattanooga, Tennessee 37402
(615) 756-2010

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 28.3 of the Supreme Court of the United States, three (3) true and exact copies of the foregoing Brief in Opposition to Motion to Dismiss or Affirm have been deposited in the United States Mail with first-class postage prepaid, addressed to Mr. Joe C. Peel, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219, on this 7 day of March, 1985.

STOPHEL, CALDWELL & HEGGIE, P.C.

By 
(Carl E. Hartley)

450 Maclellan Building
722 Chestnut Street
Chattanooga, Tennessee 37402
(615) 756-2010